

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
MICHAEL S. RIVISTO dba  
AMERICAN PLATING COMPANY, INC.,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 84-340

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of the imposition of a civil penalty of \$10,000 for violation of a state waste discharge permit, came on for formal hearing before the Pollution Control Hearings Board, Wick Dufford (presiding) and Lawrence J. Faulk on October 23, 1985, at the Board's offices in Lacey, Washington.

Extensive efforts were expended over considerable time prior to hearing to resolve the matter. Ultimately, however, these proved unavailing. At the hearing appellant Michael S. Rivisto represented himself. Respondent Department of Ecology (DOE) was represented by

1 Leslie Nellermoe, Assistant Attorney General.

2 Witnesses were sworn and testified. Exhibits were admitted and  
3 examined. Argument was heard. From the testimony, evidence, and  
4 contentions of the parties, the Board makes these

5 FINDINGS OF FACT

6 I

7 Respondent DOE is a state agency with responsibility for  
8 implementing the water pollution control laws, including the issuance  
9 and enforcement of waste discharge permits.

10 II

11 Appellant operates a metal plating business called American  
12 Plating Company located on the City Waterway in Tacoma, Washington.  
13 The plant is served by the Tacoma municipal sewer which discharges to  
14 the Puyallup River which flows into Commencement Bay.

15 III

16 On December 21, 1978, the DOE issued State Waste Discharge Permit  
17 No. 5098 to American Plating, authorizing the discharge of wastes to  
18 the Tacoma municipal sanitary sewer system subject to certain specified  
19 effluent limitations (Condition Sl.). At all times relevant to the  
20 violations asserted in this case, this permit remained in effect.

21 IV

22 In monitoring compliance with this permit, DOE's inspectors made  
23 periodic inspections of the company's operations. From the very  
24 outset compliance problems were evident and over time, DOE personnel  
25 expended considerable effort seeking to achieve more effective

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wastewater treatment.

Nonetheless, samples taken on December 21, 1983, December 29, 1983, March 13, 1984, and May 23, 1984, revealed significant violations of all the heavy metals limits (cadmium, chromium, copper, nickel, zinc), as well as the cyanide and pH standards.

## V

Enforcement of effluent limitations is accomplished through required self-monitoring, in addition to agency inspections. Such monitoring is a condition of the waste discharge permit which calls for monthly reports (Condition S2.).

On June 29, 1983, DOE inspectors met with the general manager of American Plating and pointed out that no such reports had been received since June of 1981. On July 12, 1983, the agency wrote to the company and asked for any interim monitoring data and an explanation for the failure to report. The company was urged to resume regular reporting.

Reports were submitted for the next two months and then reporting again ceased altogether.

## VI

On August 14, 1984, DOE issued to American Plating a Notice of Penalty Incurred and Due (DE 84-479) assessing a civil penalty of \$10,000. The document stated, in part:

The basis for this penalty is that American Plating Company, Inc. has violated conditions of the State Waste Discharge Permit No. 5098 on numerous occasions. These violations are considered extremely significant because of their magnitude, the fact that they are an ongoing problem and the nature of the

1 discharges, (cyanide and heavy metals, including  
2 cadmium). The total penalty amount is assessed at  
3 \$2,000.00 for each of four (4) effluent limit  
4 violations which were monitored and documented by the  
5 Department of Ecology in December 1983, March 1984,  
and May 1984 and \$2,000.00 for failure to submit  
discharge monitoring reports, also a violation of  
State Waste Discharge Permit No. 5098, and RCW  
90.48.180.

## 6 VII

7 Concurrently with the civil penalty, DOE issued to American  
8 Plating a regulatory order (DE 84-480), requiring certain actions to  
9 bring the operation into conformance with the waste discharge permit.  
10 The order called for the design and submission of plans for a  
11 wastewater pretreatment system, and the installation of the system as  
12 approved, to be operational by August of 1985.

## 13 VIII

14 On August 31, 1984, Michael Rivisto made application to the agency  
15 for relief from the penalty. The application made reference to  
16 planned improvements to the treatment system. Enclosed was a  
17 schematic design for treatment upgrading and monthly monitoring  
18 results from an independent laboratory for the previous eight months.  
19 Numerous exceedences of the permit effluent limits were shown. On  
20 October 15, 1984, DOE advised by letter that the submitted design for  
21 improved treatment was insufficient in detail for the agency to be  
22 able to evaluate and approve.

23 On November 26, 1984, DOE acted on the application for relief  
24 denying any reduction of the \$10,000 assessed.

25  
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IX

Mr. Rivisto appealed the penalty to this Board on December 27, 1984, and on January 3, 1985, and DOE requested a formal hearing. The companion regulatory order was never appealed.

X

Although the company was not submitting monitoring reports to DOE, it was for several years contracting with an independent laboratory to do sampling of its wastewater effluent. This independent monitoring showed violations of the limits set in the waste discharge permit.

Appellant did not contest the methods DOE used to analyze the samples it took during inspections nor the accuracy of the results. However, his expert witness suggested that splitting samples taken between the agency and the company would improve confidence in the procedures and eliminate possible conflicts.

DOE's inspector stated that samples are not ordinarily split on unannounced inspections, unless the discharger requests this. American Plating personnel were on hand when DOE took its samples, but made no request for a split. DOE's inspector said that the results of the samples taken during inspections are normally compared to monthly monitoring reports. Here, however, such comparison was impossible because the monthly reports had not been submitted.

XI

Mr. Rivisto testified that American Plating has been undergoing severe economic difficulties. The company which had 83 employees in 1982 was down to four by the time of the hearing.

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1 He said there had been problems with the operation of the plant  
2 such that he was not, in times past, always adequately informed about  
3 what was occurring there.

4 He professed an intention to close down the plant at the present  
5 site and move the whole operation to a new up-to-date facility at  
6 another location. This he felt is the only way to get the business  
7 back on its feet. Under the circumstances, he argued, that it is  
8 unreasonable to invest substantial funds in the upgrading of the  
9 present plant.

#### 10 XII

11 More than a year elapsed between the assessment of the penalty and  
12 the hearing in this case. During that time assurances were repeatedly  
13 made that the plant was about to shut down. This purportedly imminent  
14 event remained the justification for reluctance to invest in interim  
15 measures to achieve compliance. Some improvements in the inadequate  
16 treatment works were made, but significant portions of even the modest  
17 upgrading the company said it was willing to accomplish were still  
18 incomplete by the time of hearing. Plans supposedly complying with  
19 the regulatory order of August 14, 1984, were submitted at the hearing  
20 itself.

#### 21 XIII

22 Appellant's expert sought to minimize the violations by pointing  
23 out that the monthly discharge from American Plating is small in  
24 comparison with the immense volumes handled by Tacoma's sewage  
25 treatment plant. His view was that the company's discharges do not

1 pose and have not posed a grave environmental danger.

2 However, he also discussed the design and configuration of an  
3 interim treatment system which could be installed at moderate cost and  
4 perform well enough to meet permit limits.

5 There was no testimony that achieving compliance was beyond  
6 "known, available and reasonable" technology.

7 XIV

8 The volume of waste produced by American Plating has declined  
9 along with the decline in operations. However, recent monitoring also  
10 shows better performance in terms of metals discharges on a  
11 milligrams-per-liter basis.

12 XV

13 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
14 adopted as such.

15 From these Findings of Fact the Board comes to these

16 CONCLUSIONS OF LAW

17 I

18 The Board has jurisdiction over these persons and these matters.  
19 Chapters 43.21B and 90.48 RCW.

20 II

21 Under RCW 90.48.160 waste discharge permits are required of all  
22 commercial or industrial operations which discharge wastes to waters  
23 of the state. Such permits are issued pursuant to RCW 90.48.180.

24 Effluent limitations contained in permits are descriptive of  
25 results which the DOE concludes can be reached through the application

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1 of "known, available and reasonable" methods of treatment. RCW  
2 90.48.010; 90.52.040.

### 3 III

4 RCW 90.48.144 authorizes the imposition of civil penalties on a  
5 strict liability basis. It states in pertinent part:

6 Every person who: (1) violates the terms of  
7 conditions of a waste discharge permit issued  
8 pursuant to RCW 90.48.180...shall incur, in addition  
9 to any other penalty as provided by law, a penalty in  
10 an amount of up to five thousand dollars a day for  
11 every such violation. Each and every such violation  
12 shall be a separate and distinct offense, and in case  
13 of a continuing violation, every day's continuance  
14 shall be and be deemed to be a separate and distinct  
15 violation....

### 16 IV

17 We conclude that on December 21, 1983, December 29, 1983,  
18 March 13, 1984, and May 23, 1984, American plating Company violated  
19 condition S1. of State Waste Discharge Permit No. 5098 by discharging  
20 wastes exceeding the effluent limitations set forth.

21 we conclude further that during 1983 and 1984, American Plating  
22 Company violated Condition S2. of this permit by failing to submit  
23 Discharge Monitoring Reports to DOE.

24 These violations aggregate five (5) separate and distinct offenses  
25 for each of which a civil penalty was lawfully assessed.

### 26 V

27 In consideration of the magnitude of the violations, the  
unsuccessful pre-penalty attempts to secure compliance, and the  
ongoing nature of the problems, the amount of penalties imposed

1 (\$2,000 for each offense) does not appear unreasonable.

2 The purpose of the penalties is not solely to punish, but  
3 principally to influence behavior. Deterrence of both the violator  
4 and of the public at large is aimed at.

5 The record here shows an enterprise genuinely attempting to get a  
6 new start but delayed and frustrated in attempts to finance its  
7 rebirth. During these troubled times, pollution control concerns have  
8 taken a back seat. While understandable, this situation cannot serve  
9 as an excuse for failing to provide the degree water pollution control  
10 technology which all other businesses are also required to provide as  
11 a condition for doing business.

12 Nonetheless, we believe some consideration should be given to the  
13 economic difficulties of appellant. Within six months it should be  
14 clear whether the company will revive or cease doing business. If the  
15 violations have ceased by the date this order is entered, we urge that  
16 no effort to collect these penalties be made for at least six months.  
17 If the company, at that time, is both in operation and in compliance  
18 with its waste discharge permit, we request the DOE to adopt a liberal  
19 program of periodic payments to commence thereafter.

20 VI

21 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
22 adopted as such.

23 From these Conclusions of Law the Board enters this  
24  
25

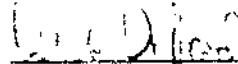
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ORDER

The Notice of Penalty Incurred and Due, DE 84-479, issued by DOE to American Plating Company is affirmed.

DONE this 23rd day of January, 1986.

POLLUTION CONTROL HEARINGS BOARD

  
WICK DUFFORD, Lawyer Member

 1/23/86  
LAWRENCE S. FAULK, Chairman